Editor's note: Appealed -- dismissed with prejudice on plaintiff's motion, Civ.No. 1-89-552 (E.D. Tenn. Oct. 2, 1990)

RITH ENERGY, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-393 Decided October 24, 1989

Petition for discretionary review of a decision by Administrative Law Judge David Torbett sustaining agency denial of a permit revision. NX 89-1-PR.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Acid and Toxic Materials

   OSMRE properly denies an application for permit revision when the applicant does not provide sufficient opera-tional data to demonstrate that reclamation, as required by SMCRA and the Tennessee Federal program, can be accomplished under the permit plan, or that the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area. Under 30 U.S.C. § 1265(b)(10)(A) (1982) and 30 CFR 816.41(f), OSMRE is required to avoid acid or other toxic mine drainage so as to minimize disturbance to the prevailing hydrologic balance.

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for petitioner; Tom FitzGerald, Esq., Frankfort, Kentucky, for Save Our Cumberland Mountains, Inc., Intervenor; and Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

By order of June 1, 1989, this Board granted a petition for discretionary review filed by Rith Energy, Inc. (Rith). Petitioner sought review of a decision by Administrative Law Judge David Torbett, dated March 28, 1989, sustaining a denial by the Knoxville Field Office (KFO), Office of Surface Mining Reclamation and Enforcement (OSMRE), of Rith's application for Significant Revision No. 10.

By its application, petitioner sought to revise permit 2583, which was issued to Rith on January 3, 1986, for an 89-acre surface coal mining opera-tion in Bledsoe County, Tennessee. Shortly after issuance of the permit, OSMRE suspended Rith's operations on a portion of this permit until Rith had submitted and OSMRE had approved an adequate toxic materials handling plan (TMHP). Rith submitted such a plan as Significant Revision No. 10 on January 15, 1988, and subsequently amended it following a series of technical reviews by OSMRE.

KFO denied Rith's application for Significant Revision No. 10 because it found that the application did not satisfy 30 CFR 942.774.13(c). 1/ This regulation requires that an application for permit revision demonstrate, inter alia, that applicable requirements under 30 CFR 942.773.15(c) "which are pertinent to the revision" are met. Regulation 30 CFR 942.773.15(c) requires that an application affirmatively demonstrate, and the regulatory authority find, inter alia, that the application is complete and accurate and that reclamation, as required by the Act and the regulatory program, can be accomplished under the reclamation plan contained in the permit application. 2/ In its decision, dated September 6, 1988, KFO expressly stated that it could make no such findings.

Immediately prior to issuing this decision of September 6, 1988, KFO had received from Tare, Inc., petitioner's consulting engineer, the last of three responses prepared by Tare, each addressing a deficiency letter issued by KFO. It was the consensus of the KFO technical review team that Rith remained unresponsive to the earlier deficiencies and that its TMHP remained a general plan. Joe B. Maddox, Chief, Division of Tennessee Permitting, KFO, testified, "We didn't have the level of detail that we would need in order to make that finding [under 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c)]" (Tr. 566).

The deficiencies that KFO found to be unaddressed in Rith's TMHP are set forth in KFO's final deficiency letter of July 25, 1988 (Exh. R-15). The deficiencies focus upon a plan to isolate potentially acidic shales in pods that would be compacted to minimize infiltration (Exh. R-3 at 4). KFO's letter relied heavily upon a report by the Eastern Field Operations (EFO) office, OSMRE, and noted the following deficiencies, 3/ inter alia:

> Provide a detailed description of the operations plan showing how the conceptual model can be successfully implemented during

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1/ KFO's decision of Sept. 6, 1988, referred to regulations under the Tennessee Federal program. See 30 CFR Part 942.

2/ The Act referred to is the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1982). Requirements similar to 30 CFR 773.15(c) are set forth at 30 U.S.C. § 1260 (1982).

3/ Concern was also voiced by the Environmental Protection Agency (EPA), who commented upon the TMHP by letter of Aug. 9, 1988 (Exh. R-18). EPA explained that its interest was the protection of surface water and

mining and reclamation. The operations plan should include a description of the Whitwell shale blasting and excavation tech-niques assuring the minimum particle size is attained; contingencies made for the material segregation and temporary storage provisions; and material balances showing estimated swell and recompaction volumes of toxic material, non-toxic Whitwell shale, and Newton sandstone on an individual cut basis. * * *.

Provide, on an individual cut basis, a detailed description of pod construction techniques, and describe how positive drainage from the pod surface will be ensured. Engineering drawings should be prepared * * * to depict plan views of each pod, and should provide individual pod dimensions and areal positioning relative to the mine site.

* * * * * * *

A demonstration must be provided to show the capability to perform the exacting compaction and selective materials handling practice that would result in the required permeabilities. * * *

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fn. 3 (continued)
groundwater from contamination by acid-mine drainage. The pod plan addressed by EPA below was initially devised by EFO:

"Conceptually we feel that the proposed isolation of toxic spoils in relatively impermeable pods on the mine site is feasible. However, problems associated with the use of on-site shale for pod liner material and site-specific hydrologic conditions will seriously limit the effectiveness of the proposed plan in preventing the formation of acid leachate that could degrade ground and/or surface waters.

"Our main concern at present is the assertion that the proposed waste handling plan will prevent saturation of the encapsulated toxic materials. Our evaluation of the hydrologic modeling presented in the assessment indicates that the hydraulic capacity of the sandstone underdrain and the shale backfill material around the pods will not be adequate to convey surface and groundwater infiltration and ensure that saturated conditions will not occur. We believe it is likely that execution of the plan as proposed will result in saturation of the pods at least some of the time with the possibility that they will remain in a saturated condition. Under such conditions, toxic leachates will be generated since the liner material will not be totally impermeable.

"After evaluating the pod construction design, we do not believe that the permeability test results support the use of shale liners as a practical means of controlling leachate from toxic materials. Although the tests indicated that acceptably low permeabilities can be achieved with compacted, minus 1/4-inch shale particles, the tightly controlled laboratory conditions are unlikely to be duplicated in the field, especially with shale fragments as large as 6 inches. The proposed on-site test pad demonstration should provide better information on which to draw conclusions but only if test methods are altered to reflect actual pod construction conditions as noted in our technical comments."

* * * * * * *

> Field observations of the current mine status indicate that a correction of the Sewanee coal seam cropline on your mining operations map is needed. * * * This incorrect cropline significantly affects the volumes of potentially acid forming shale * * *.
>
> Provide a narrative with appropriate cross-references that discusses how the Newton Sandstone will be removed and stored; how the potentially acid-forming materials [4/] will be removed and stored; how the Richland overburden will be removed and stored and then replaced to obtain a positive drain; how the Newton Sandstone will then be replaced as an underdrain; how and what material will be used for construction of the pads for the placement of the compacted pods of potentially acid-forming material; how the potentially acid-forming material will be placed in pods and compacted; and where and what material will be used for four feet of non-toxic and non-combustible cover. Cut-by-cut descriptions should be provided * * * along with material balances for each type of spoil.

(Exh. R-15 at 3, 4).

In its response to KFO's deficiency letter of July 25, 1988, Rith acknowledged the presence of approximately 235,000 cubic yards of potentially acid-forming shale immediately above and below the Sewanee coal seam (Exh. R-19 at item 67.c). To prevent the formation of acid drainage, petitioner selected "an isolation and treatment approach." Id. Its TMHP, responding to KFO's deficiency letter, states in part:

> The shale layer under the Newton sandstone and approximately about 3 feet below the Sewanee seam will be removed by dozers with rippers, loaders, trucks or scrapers. This potentially acid form-ing shale may have to be loosened by careful blasting to facilitate handling. The removal of the acid shale shall be accomplished in a manner that promotes break up of the shale into as fine a particle size as possible. If the shale is ripped, it is to be cross ripped and tracked over several times to break the shale into particles with a maximum size of 4 to 6 inches. If blasting is necessary, a shot pattern that produces a minimum size particle will be utilized. It is recognized that the minimum sized shale particles produced will promote compaction to the desired standard.

4/ "Acid-forming materials" are earth materials that contain sulfide mineral or other materials which, if exposed to air, water, or weathering processes, will cause acids that may create acid drainage. "Acid drainage" is water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations. 30 CFR 710.5.

> The pods will be constructed essentially as spherical segments to insure positive drainage from the compacted surface. The diameter of segments will vary depending upon the quantity of acid material to be stored. The number and placement of segments will be determined from advanced drilling of each cut prior to mining.

(Exh. R-19 at item 67.c).

Rith also reviewed the probable hydrologic consequences of its TMHP and responded to KFO's deficiency letter in this manner:

> The concept of minimizing contact of water with acid material disposed in compacted pods over a sandstone underdrain depends upon differential permeabilities between the areas around the pods and the compacted pods. To document the compactibility of the shale and the resulting impermeable nature of a compacted pod, labora-tory determinations of permeability were conducted on the shale from the RITH ENERGY mine. * * *
>
> The laboratory studies indicated that the shale material available from the mine site can be compacted to achieve perme-ability values that will minimize contact of water with acid material resulting in no anticipated impact on the hydrologic balance [5/] due to the disturbing of potentially acid forming material during mining. The test results indicated that field compaction of acid material to a Proctor density that would result in a hydraulic conductivity of 5x10-5cm/sec or less should be the goal. To achieve the desired differential permeability around the pods, the resulting hydraulic conductivity around the pods should be greater than 1x10-3cm/sec.

(Exh. R-19 at item 77.b.5).

As noted above, KFO's Maddox found that Rith's TMHP lacked the detail necessary to find that regulations 30 CFR 942.774.13(c) and 30 CFR 942.773.15(c) had been satisfied. At the hearing before Judge Torbett, OSMRE also presented evidence that Rith underestimated the volume of acidforming material (Tr. 436-45). Such underestimation caused OSMRE to con-clude that Rith's pods would be 58 percent undersized and, therefore, incapable of housing the toxic material (Tr. 445-46). Additional testimony was offered by OSMRE that temporary storage of toxic material would be necessary at certain cuts in the mining plan (Tr. 437-38).

5/ "Hydrologic balance" is the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage. 30 CFR 710.5.

In his decision, Judge Torbett found that "the clear weight of the evi-dence" showed that Rith significantly underestimated the volume of toxic material on-site. This fact and the further finding that a plan for tempo-rary storage was necessary, but lacking, caused Judge Torbett to conclude that serious doubts existed that Rith could reclaim the site as required by law. The Judge also concluded that without a detailed operational plan it would be impossible for OSMRE to make a rational judgment as to whether Rith was in fact reclaiming the site as required.

Judge Torbett also focused on Rith's duty to demonstrate that its operation was designed to prevent material damage to the hydrologic balance outside the permit area, when considered with the probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area. 30 CFR 942.773.15(c)(5). The Judge quoted from James Hughes, a physical scientist employed by OSMRE, who testified that Significant Revision No. 10 contained data "inadequate to make a complete determination of whether the proposed acid materials handling plan would adequately protect water quality" (Tr. 372).

OSMRE's concerns focused on the size, compaction, and permeability of shale particles that would be used to isolate potentially acid-forming materials from the Sewanee Conglomerate aquifer below. Specifically, OSMRE doubted whether a small enough particle could be achieved on-site and compacted to form an impermeable buffer between the toxic materials and percolating groundwater.

Judge Torbett found undisputed the presence of a highly acidic overburden above and below the Sewanee coal seam that Rith intended to mine. 6/ Also undisputed, the Judge found, was OSMRE's evidence of the potential acidity of the north side of the minesite. This finding was clear, the Judge noted, even though Rith argued that it had mined the Sewanee seam on the south side without evidence of acid mine drainage.

Regarding Rith's duty to prevent material damage to the hydrologic balance, 30 CFR 773.15(c)(5), Judge Torbett summarized his findings at page 26 of his decision:

> The undersigned finds that the overburden on the north side of Applicant's permit was undeniably of a highly acidic nature. Unless Applicant could demonstrate that the pod concept would work, there would have been a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer. Given the importance of particle size to the issue of permeability of the pods, the undersigned finds that [OSMRE's] concerns for damage to the hydrology from Applicant's proposed toxic material handling plan were legitimate.

6/ In addition to the Sewanee, Rith intended to mine the Richland coal seam.

Testimony was also received at the hearing in support of Rith's argument that undue influence was brought to bear upon OSMRE by the involvement of the Environmental Protection Agency, various political figures, and intervenor Save Our Cumberland Mountains, Inc. (SOCM), in the administrative process. Judge Torbett found that petitioner had failed to provide substantial evidence of any undue influence in the decisionmaking process.

Based on our review of the record we find that the evidence supports Judge Torbett's decision that OSMRE properly denied Rith's application for permit revision.

In its statement of reasons on appeal, Rith stresses that OSMRE's concern for the high potential acidity of shales near the Sewanee seam is belied by the fact that "during the entire time Rith mined the Richland and Sewanee coal seams on the south side of its permit and through the 2-1/2 to 3 years since that portion of this site has been reclaimed there has been no acid mine drainage problem nor any evidence of any acid mine drainage problem" (Statement of Reasons, July 10, 1989, at 18). The potential for acid-mine drainage has not developed, Rith contends, because its originally approved manner of handling overburden and potentially acid-forming material, as used on the south side of the permit, has worked. Id. at 19.

Rith also contends that OSMRE has disregarded its own geologic conclusions concerning the impact of mining on groundwater. Even conceding that the geochemical data about the overburden of the Sewanee coal seam shows a greater potential for the development of acid water than first deter-mined, 7/ petitioner states, the conclusions regarding the physical geology of the site remain unchanged. In two environmental assessments (EA's) prepared by the agency, one prior to permit suspension and one after, OSMRE determined that vertical movement of groundwater was "restricted by an impermeable strata," Rith notes (Exh. A-9 at 8). Quoting from the later EA, petitioner states,

> The low transmissivity of the Pennsylvanian strata results in a low recharge rate to bedrock aquifers and minimizes or prevents circulation of ground water from the site with that in the bedrock aquifer. Thus, the impact of the proposed operation upon underlying Pennsylvanian aquifers would be small.
>
> * * * Further elevation of iron and manganese concentrations because of the proposed mining operation is unlikely since underlying aquifers are protected from impact by a layer of impermeable shale.

Id. at 8-9.

7/ As explained infra, Rith's permit application contained geochemical data that OSMRE found to be "diametrically opposed" to its own. Testing the shale zone above the Sewanee coal seam, OSMRE found potential acidity to be higher (250 percent difference) and neutralization lower (500 percent difference) (Exh. R-1). This disparity provoked an investigation by the Office of the Inspector General, U.S. Department of the Interior, who found no evidence of fraudulent analysis (Tr. 121).

Finally, petitioner argues that KFO incorrectly required a plan that was "designed to prevent leachates [8/] from entering the surface and ground water" and that would allow KFO "to make a finding that there will be no adverse impact to the hydrologic balance" (Statement of Reasons at 22, quoting from Exhs. A-2 and A-3 (emphasis added by Rith)). 9/ Both SMCRA and the regulations clearly recognize that the standards demanded by KFO are impossible of achievement for any coal mine, Rith contends.

In support of this argument, petitioner cites 30 U.S.C. § 1265(b)(10) (1982), which states:

> (b) General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as a minimum to--
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> * * * * * * *
>
> (10) minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by--
>
> (A) avoiding acid or other toxic mine drainage by such measures as, but not limited to--
>
> (i) preventing or removing water from contact with toxic producing deposits;
>
> (ii) treating drainage to reduce toxic content which adversely affects downstream water upon being released to water courses;
>
> (iii) casing, sealing, or otherwise managing boreholes, shafts, and wells and keep acid or other toxic drainage from entering ground and surface waters * * *. [Emphasis added.]

Petitioner also points to 30 CFR 816.41(b) and (d), which state:

> (b) Ground-water protection.
>
> (1) Ground-water quality shall be protected by handling earth materials and runoff in a manner that minimizes acidic, toxic, or

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8/ "Leachate" is a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials. 30 CFR 710.5.

9/ These exhibits are letters from KFO to William Ring of Rith Energy, Inc., dated June 20 and 27, 1986, respectively.

other harmful infiltration to ground-water systems and by managing excavations and other disturbances to prevent or control the discharge of pollutants into the ground water.

* * * * * * *

(d) Surface-water protection.

(1) Surface-water quality shall be protected by handling earth materials, ground-water discharges, and runoff in a manner that minimizes the formation of acidic or toxic drainage; prevents, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow outside the permit area; and otherwise prevents water pollution. [Emphasis supplied.]

Rith argues that the criteria by which a TMHP should be judged is not the absolute prevention of leachates or the absolute prevention of adverse impacts, but rather a minimization of disturbance to the hydrologic balance and no substantial adverse impact (Statement of Reasons at 24).

Petitioner's first argument, addressing the absence of acid-mine drainage in the south side of the permit, is answered by the testimony of Willis Gainer, Chief, Branch of Southern Coal Fields, KFO. When questioned whether such drainage would be apparent if there was a handling problem, Gainer replied:

A We have seen, in the typical mining situations in Tennessee, where acid problems have developed. It takes two to three years following mining, sometimes up to five years, for an acid seep to develop.

It depends on the rainfall and the saturation process of the backfill how soon it fills up and seeps out through the fill itself.

* * * * * * *

* * * We believe that there is a limited amount of toxic material, acid forming material disturbed on the south side.

Our geologists indicated that in some -- at least, one of them did -- he saw the toxic material actually pinched out above the coal seam, which would mean a reduced amount of toxic material or acid forming material was there to be disturbed.

(Tr. 174, 219).

Alfred Whitehouse, Deputy Assistant Director of Program and Technical Support, OSMRE, also testified to the likely effect that drought conditions had on the south side, noting that no discharge had occurred anywhere from the site (Tr. 610). The testimony of Gainer and Whitehouse suggest that it

may be too soon to conclude that petitioner was successful in avoiding acid drainage on the south side of the permit. We find that OSMRE's concerns are well founded. The absence of any present acid mine drainage does not mean that acid mine drainage will not occur in the future. Moreover, the record shows that a larger amount of toxic material has been identified on the north side of the permit area, which is the subject of the revised plan. Petitioner's first argument is, accordingly, rejected.

Rith's second argument, i.e., that OSMRE's decision contradicts two prior EA's regarding the vertical movement of groundwater, is similarly unpersuasive. When questioned about the original EA, KFO's Maddox testified that it was based on data submitted by Rith, which data was later determined to be unrepresentative of the actual geology of the minesite. The effect of this unrepresentative data "rendered the original environmental assessment as it relates to the toxic material invalid because it was based upon information that was not representative" (Tr. 533-34; see also Exh. R-1).

With respect to the second EA, which Rith correctly notes was issued after its permit was suspended, Gainer testified that this EA (and accompanying finding of no significant impact (FONSI)) addressed only Rith's plan to relocate a county road on the minesite and mine the Richland coal seam underneath (Tr. 224). Maddox agreed, stating that the EA was limited to the impacts of relocating the road (Tr. 533).

As OSMRE examined more closely the geology of the minesite, its views of the permeability of rock overlying the Sewanee Conglomerate aquifer changed. Thus, James Hughes testified, when asked about the shale stratum immediately above the aquifer, "As far as the Whitwell Shale beneath the Richland coal [is concerned], in the course of mining [and] blasting that is necessary during mining we tend to fracture that, and as a result that would facilitate the vertical percolation of water through the shale unit (Tr. 947).

The testimony of Maddox and Gainer offers plausible reasons for the contradictory conclusions reached by the EA's and KFO's denial of Significant Revision No. 10. Additional testing necessitated by the agency's inquiry into the permeability of the Whitwell Shale is a further plausible reason. OSMRE must be free to correct statements in its EA's when new data requires it; to do otherwise is to perpetuate error. Petitioner's showing of inconsistency does not demonstrate error in the agency's final course of action.

[1] Petitioner's ultimate argument challenges the standard that OSMRE used in evaluating Rith's TMHP. As noted above, Rith contends that OSMRE used too stringent a standard and should instead have sought to minimize disturbance to the prevailing hydrologic balance, as set forth at 30 U.S.C. § 1265(b)(10) (1982) and 30 CFR 816.41(b) and (d). 10/

10/ In its statement of reasons at 2, Rith charges that OSMRE adopted such a standard and required a much more complex TMHP because of "pressure from SOCM." While it is clear that SOCM opposed approval of Rith's TMHP, to the

A careful reading of the applicable statutory and regulatory language reveals that OSMRE is directed to "minimize the disturbances to the prevailing hydrologic balance" by taking a variety of actions. One of these actions is "by avoiding acid or other toxic mine drainage." 30 U.S.C. § 1265(b)(10)(A) (1982) (emphasis added). Measures of avoidance are set forth by statute, and the first of these is achieved by "preventing or removing water from contact with toxic producing deposits." (Emphasis added.) Id. Thus, the statute, as properly read, requires the agency to minimize disturbance to the prevailing hydrologic balance by avoiding acid or toxic mine drainage. Minimizing the contact of water and toxic-producing deposits, as argued by petitioner, is not the standard. See also 30 U.S.C. | 1265(b)(14)(1982) and H.R. Rep. No. 218, 85th Cong., 1st Sess. 114, 174 (1977).

Petitioner finds some support for its position in 30 CFR 816.41(b) and (d), quoted supra, but overlooks 30 CFR 816.41(f), the regulation specifically addressing acid- and toxic-forming materials. This regulation states in part:

> (f) Acid- and toxic-forming materials. (1) Drainage from acid- and toxic-forming materials into surface water and ground water shall be avoided by--
>
> (i) Identifying and burying and/or treating, when necessary, materials which may adversely affect water quality, or be detrimental to vegetation or to public health and safety if not buried and/or treated, and
>
> (ii) Storing materials in a manner that will protect surface water and ground water by preventing erosion, the formation of polluted runoff, and the infiltration of polluted water. [Emphasis added.]

Further support for OSMRE's action in this case is set forth in the preamble to this regulation, which states in part:

> The final rule requires that the drainage from acid- and toxic-forming material be avoided by identifying, treating or burying, and, when necessary, burying and treating such materials

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fn. 10 (continued)
extent that Rith is asserting that SOCM acted improperly in doing so, there is no evidence in the record to support such an assertion. As Willis Gainer testified:

"Under the public review process, they have the opportunity to comment. We are required to take all public comments received into consideration.

"So, from the standpoint that they have provided comments, a lot of them in technical areas, we do look at them and address them and make sure that if a regulations [sic] require them that the plan covers them."
(Tr. 181).

in order to prevent adverse effects to water quality, to vegetation, or to public health.

See 48 FR 43956, 43979 (Sept. 26, 1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Torbett is affirmed as modified. 11/

Gail M. Frazier
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

11/ Judge Torbett incorrectly stated at page 23 of his decision that the burden of persuasion shifted to Rith when OSMRE made out its prima facie case. Regulation 43 CFR 4.1376 provides that the ultimate burden of per-suasion rests with the applicant for a permit revision, i.e., Rith. The burden of persuasion does not shift from party to party. McCormick on Evidence § 336 (3d ed. 1984). The evidence is such that this error does not alter the result in this case; the Judge's decision may be affirmed, but as modified in this regard.